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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT PHILLIP FIGUEROA,

Defendant and Appellant.

G058208

(Super. Ct. No. C78146)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, James E. Rogan, Judge. Request for judicial notice granted. Reversed and remanded with directions.

Dawn S. Mortazavi, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Thomas S. Patterson, Assistant Attorney General, Tamar Pachter and Nelson R. Richards, Deputy Attorneys General, as Amicus Curiae on behalf of Defendant and Appellant.

Todd Spitzer, District Attorney, and Seton B. Hunt, Senior Deputy District Attorney, for Plaintiff and Respondent.

Defendant Robert Phillip Figueroa appeals from the lower court’s denial of his petition for resentencing under Penal Code section 1170.95 (undesigned statutory references are to the Penal Code). The court found the legislation enacting section 1170.95 violated article II, section 10, subdivision (c) of the California Constitution by improperly amending two prior voter initiatives: 1978’s Proposition 7 and 1990’s Proposition 115. As a result, the court further found defendant was not entitled to relief under section 1170.95. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND¹

In 1990, a jury convicted defendant of conspiracy to commit murder, two counts of first degree murder, and 11 counts of deliberate and premeditated attempted murder. The trial court sentenced him to two consecutive terms of life without the possibility of parole on the murder counts, and a concurrent term of 25 years to life on the conspiracy count. Imposition of sentence on the attempted murder counts was stayed pending completion of his sentence on the murder counts. We affirmed defendant’s conviction in a nonpublished opinion. (*People v. Figueroa, et al.* (June 30, 1992, G010268, G010371) [nonpub. opn.]) In 2018, defendant’s sentences on the murder counts were commuted by the Governor from life without the possibility of parole to life with parole possibility.

In 2019, defendant filed his petition seeking resentencing on the murder counts pursuant to section 1170.95. In a lengthy written ruling, the lower court denied the petition. It found Senate Bill No. 1437 (Stats. 2018, ch. 1015; SB 1437)—the legislation that, among other things, enacted section 1170.95—unconstitutionally “constitute[d] a legislative amendment of Proposition 7 adopted without the electorate’s

¹ The exact facts underlying defendant’s conviction are not at issue in this appeal. Suffice it to say that defendant was a passenger in a pickup truck from which a gang-related drive-by shooting resulted in two deaths and numerous serious gunshot injuries. The exact nature and legal theory of defendant’s culpability is not before us at this time and instead is a matter to be resolved in the first instance in the lower court on remand.

approval,” and improperly amended Proposition 115 “without the requisite two-thirds majority of each house of the California Legislature”² The court did not address whether defendant otherwise qualified for relief under section 1170.95.

Defendant appeals, arguing the trial court erred by finding SB 1437 unconstitutional. He seeks reversal of the order denying his section 1170.95 petition and a remand for a hearing on its merits. The Attorney General filed an amicus curiae brief on behalf of defendant (Cal. Rules of Court, rule 8.200(c)(7)), defending the constitutionality of SB 1437, and contending it amends neither Proposition 7 nor Proposition 115. The Orange County District Attorney, representing the People in this appeal, maintains SB 1437 unconstitutionally amends the two propositions.³

The constitutionality of SB 1437 was upheld on the same grounds by a different panel of this Division Three in *People v. Solis* (2020) 46 Cal.App.5th 762 (*Solis*), and *People v. Cruz* (2020) 46 Cal.App.5th 740 (*Cruz*). This followed similar decisions by our colleagues in Division One of this court in *Gooden* and *People v. Lamoureux* (2019) 42 Cal.App.5th 241 (*Lamoureux*). Division Six of the Second District reached the same conclusion in *People v. Bucio* (2020) 48 Cal.App.5th 300, 307 (*Bucio*). Finally, and most recently, another panel of this Division Three took a slightly different tack, and upheld SB 1437 because by its very terms it did not amend or otherwise affect any *initiative* statutes, and instead only enacted or modified existing *legislative* statutes,

² The Legislature passed SB 1437 by a two-thirds vote in the Senate but a less than two-thirds majority in the Assembly. *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 277 (*Gooden*).

³ The district attorney requests we take judicial notice of seven “matters.” Five involve legislative material relating to SB 1437 and voters’ ballot information on Propositions 7 and 115. The other two “matters” are the 1977 and 1978 versions of sections 187, 188, and 189. Having received no opposition, we grant the district attorney’s request. (Evid. Code, §§ 451, 452, 459, subd. (a).)

which it is constitutionally empowered to do. (*People v. Prado* 49 Cal.App.5th 480 (*Prado*).)

To date, no appellate court has decided otherwise, on any ground, and the Supreme Court has not taken up the issue.

In these earlier cases, the courts have agreed with arguments substantially the same as those advanced by defendant and amicus curiae in this case, and rejected arguments like those presented here by the district attorney. For the reasons articulated in *Cruz* and *Solis*, with which we agree and adopt as our own, we do the same. Thus, we conclude the lower court erred by finding SB 1437 unconstitutional. We reverse the trial court's order denying defendant's section 1170.95 petition, and remand the matter with directions to consider the petition on the merits.

DISCUSSION

“We review de novo questions of statutory construction and the determination of a statute's constitutionality.” (*Stennett v. Miller* (2019) 34 Cal.App.5th 284, 290; *People v. Armogeda* (2015) 233 Cal.App.4th 428, 435 [whether a new law amends a proposition is a question of law reviewed de novo].) We begin “‘with the presumption that the Legislature acted within its authority.’” (*People v. DeLeon* (2017) 3 Cal.5th 640, 651.) “[O]ne of the fundamental principles of our constitutional system of government is that a statute, once duly enacted, ‘is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity.’ [Citations.]” (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086.) “‘Unless conflict with a provision of the state or federal Constitution is clear and unquestionable, we must uphold the [statute].’” (*Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1252.)

Effective January 1, 2019, SB 1437 was enacted to “amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did

not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1, subd. (f).) It accomplished this by amending section 188, which defines malice, to add a requirement that all principals to a murder must act with express or implied malice to be convicted of that crime. (*Id.* § 2.) It also amended section 189, which defines the degrees of murder, by adding a condition to the felony murder rule. Thus, in order to be convicted of felony murder, a defendant who was neither the actual killer nor a direct aider and abettor to the murder must have been a major participant in the underlying felony who acted with reckless indifference to human life. (*Id.* § 3; see *People v. Martinez* (2019) 31 Cal.App.5th 719, 723.)

Relevant here, SB 1437 also established a procedure for the defendants previously convicted of murder to seek resentencing if they believe they could not currently be convicted of that crime under the newly amended provisions of sections 188 and 189. (SB 1437, § 4 [enacting newly codified section 1170.95].) Section 1170.95 thereby allows those “convicted of felony murder or murder under a natural and probable consequences theory . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts” (§ 1170.95, subd. (a).)

Article II, section 10, subdivision (c) of the California Constitution prohibits the Legislature from amending a statute enacted through voter initiative without “approval of the electorate unless the initiative measure itself permits amendment or repeal without voter approval.” (*People v. Cooper* (2002) 27 Cal.4th 38, 44.) The purpose of this “constitutional limitation on the Legislature’s power to amend initiative statutes is to “protect the people’s initiative powers by precluding the Legislature from undoing what the people have done, without the electorate’s consent.”” (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025.) Our Supreme Court has “described an amendment as ‘a legislative act designed to change an existing initiative statute by adding or taking from it

some particular provision.” (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.) Even so, not all new legislation that “concerns the same subject matter as an initiative” is necessarily an amendment. (*Ibid.*) “[T]he Legislature remains free to enact laws addressing the general subject matter of an initiative, or a ‘related but distinct area’ of law that an initiative measure ‘does not specifically authorize *or* prohibit.’” (*Kelly*, at p. 1026, fn. 19; accord, *Pearson*, at p. 571.)

In *Cruz*, we analyzed whether SB 1437 amended Propositions 7 and 115. (*Cruz*, *supra*, 46 Cal.App.5th at pp. 752-761.) We concluded: “[T]he Legislature’s enactment of Senate Bill 1437 has not undone what the voters accomplished with Proposition 7 or Proposition 115 and therefore the legislation does not violate the constitution. Senate Bill 1437 addresses the *elements* of murder, an area related to but distinct from the *penalty* for murder set by voters in Proposition 7. Nothing in the language of Proposition 7 nor its ballot materials evidences an intent by the voters to prohibit the Legislature from refining the elements of murder, namely limiting accomplice liability under the natural and probable consequences doctrine or felony-murder rule. Nor did the voters so limit the Legislature with the passage of Proposition 115.” (*Id.* at p. 747, italics added; cf. *People v. Powell* (2018) 5 Cal.5th 921, 943 [the power to *define* crimes is vested in the Legislature].) Thus, we rejected a contention that SB 1437 alters the punishment for murder set by Proposition 7 by amending the definition of malice in section 188 and by limiting who can be prosecuted for felony murder under section 189. (*Cruz*, at p. 754.)

We also concluded SB 1437 did not amend Proposition 115, and rejected an argument that the Legislature was prohibited from addressing accomplice liability for *felony murder* in SB 1437 merely because accomplice liability in *capital cases* had been addressed in Proposition 115. (*Cruz*, *supra*, 46 Cal.App.5th at pp. 759-760.) We explained SB 1437’s limitations on accomplice liability “in section 189 is an area of law related to but distinct from accomplice liability in special circumstance murder in section

190.2” and “Senate Bill 1437 did not improperly amend Proposition 115 by adding such restrictions to felony murder in section 189.” (*Cruz*, at p. 760.)

Likewise, in *Solis*, we determined SB 1437 does not authorize anything prohibited by Propositions 7 or 115, nor prohibit anything authorized by the voters in these two initiatives. (*Solis, supra*, 46 Cal.App.5th at p. 769.) After reviewing the ballot materials for Proposition 7 (*id.* at pp. 776-777), we concluded “Senate Bill No. 1437 is neither inconsistent with Proposition 7, nor does it circumvent the electorate’s intent.” (*Id.* at p. 779.) After considering its text and ballot materials, we reached the same conclusion regarding Proposition 115. (*Id.* at pp. 780-783.) The district attorney offers nothing to persuade us to change these conclusions.

As noted, in upholding SB 1437’s constitutionality in *Cruz* and *Solis*, we reached the same conclusions our Division One colleagues did in *Gooden, supra*, 42 Cal.App.5th 270 and *Lamoureux, supra*, 42 Cal.App.5th 241. In *Gooden*, the majority concluded Senate Bill 1437 was constitutional, explaining it did not amend either “Proposition 7 or Proposition 115 because it neither added to, nor took away from, the initiatives.” (*Gooden*, at p. 275; accord, *Lamoureux*, at p. 251.) As the *Gooden* court observed, “the voters who approved Proposition 7 and Proposition 115 got, and still have, precisely what they enacted—stronger sentences for persons convicted of murder and first degree felony murder liability for deaths occurring during the commission or attempted commission of specified felony offenses. By enacting Senate Bill 1437, the Legislature has neither undermined these initiatives nor impinged upon the will of the voters who passed them.” (*Gooden*, at p. 289.) Similarly, in *Bucio*, Division Six of the Second District acknowledged *Gooden* and *Lamoureux*, and held “Senate Bill 1437 is constitutional.” (*Bucio, supra*, 48 Cal.App.5th at p. 307.)

The *Bucio* and *Lamoureux* courts also addressed and rejected additional constitutional challenges to SB 1437 that were not considered by the lower court here.⁴ Both courts found SB 1437 does not conflict with the victims’ rights provisions of “Marsy’s Law.” (Cal. Const, art. I, § 28, subd. (a)(6).) (*Bucio, supra*, 48 Cal.App.5th at p. 312; *Lamoureux, supra*, 42 Cal.App.5th at pp. 264-267.) In addition, both found section 1170.95 does not violate the separation of powers doctrine (Cal. Const., art. III, § 3), either by infringing upon the governor’s exclusive commutation and clemency powers or the judiciary’s power to resolve specific cases and controversies. (*Bucio*, at p. 313; *Lamoureux*, at pp. 256, 261.) To foreclose additional constitutional attacks on SB 1437 on these grounds on remand, we find these additional conclusions in *Bucio* and *Lamoureux* persuasive and, although obiter dicta here, adopt them as our own.

In the end, the arguments advanced by the district attorney in this case are identical to those we have already rejected in *Cruz*, *Solis*, and *Prado*, and the district attorney has offered nothing to convince us we were incorrect.⁵ We see no reason to depart from our analyses and conclusions in those cases—and those of our colleagues in Division One of this court and Division Six of the Second District—that SB 1437 is constitutional.

Therefore, for the reasons articulated in *Cruz* and *Solis*, we conclude the lower court here erred by denying defendant’s section 1170.95 petition.

⁴ The question before the lower court here was framed as: “Is the California Legislature’s enactment of Senate Bill 1437 constitutional under §10(c) of Article II of the California Constitution in light of the electorate’s passage of Propositions 7 (1978) and 115 (1990)?” The parties’ briefing was similarly limited, as was the court’s ultimate ruling.

⁵ We realize briefing in this matter was concluded before *Cruz* and *Solis* were decided. Even so, while the district attorney acknowledged *Gooden* and *Lamoureux* in his respondent’s brief, he offered no analysis or discussion of those decisions to persuade us not to follow them—other than to point out we are not bound by the decisions of the other courts of appeal. So noted.

DISPOSITION

The order denying defendant's petition for resentencing is reversed and the matter is remanded for further proceedings under section 1170.95. We express no opinion how the court should rule at those proceedings.

THOMPSON, J.

WE CONCUR:

IKOLA, ACTING P. J.

GOETHALS, J.